Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-716

ARTHUR N. ABBEY, on behalf of himself and on behalf of all shareholders of Control Data Corporation, derivatively,

Petitioner,

vs.

CONTROL DATA CORPORATION, a nominal defendant herein, and Norbert R. Berg, Thomas G. Kamp, William R. Keye, Robert M. Price, Robert D. Schmidt, William C. Norris, Marvin G. Rogers, and the present and former officers and employees of Control Data Corporation and its subsidiaries who were granted stock options which have been or may be exercised by them pursuant to the Executive Performance and Retention Plan and Control Data Corporation's Employees' NonQualified Stock Option Plan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Signatures Appear on Inside Cover)

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CONTROL DATA CORPORATION, a nominal defendant herein, and Norbert R. Berg, Thomas G. Kamp, William R. Keye, Robert M. Price, Robert D. Schmidt, William C. Norris, Marvin G. Rogers, and the present and former officers and employees of Control Data Corporation and its subsidiaries who were granted stock options which have been or may be exercised by them pursuant to the Executive Performance and Retention Plan and Control Data Corporation's Employees' NonQualified Stock Option Plan,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, Arthur N. Abbey, et al., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these procedings on August 6, 1979.

OPINIONS BELOW

The opinion of this Court of Appeals is reported at CCH Current Volume, ¶96,949, p. 95,964, August 6, 1979 and appears at 603 F.2d 724 (8th Cir. 1979), and also appears at Appendix A, *infra,* pp. A-1. The opinion of the United States District Court appears at 460 F.Supp. 1242 (D.Minn. 1978) and at Appendix B, *infra,* pp. A-15.

JURISDICTION

The Court of Appeals opinion affirming the Judgment of the District Court was filed on August 6, 1979. See Appendix A, pp. A-1, *infra.* This petition for *certiorari* was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Petitioner Abbey brought this private derivative stockholders action pursuant to Rule 23.1 of the Federal Rules of Civil Procedure to compel repayment of civil and criminal penalties levied on Control Data Corporation (hereinafter CDC) as a result of guilty pleas to criminal violations of 18 U.S.C. §1343 and 31 U.S.C. §1059, which statutes prohibited fraudulent transfer of monies to agents of foreign governments for bribes or other illegal purposes. The amount of penalties levied against CDC was $1,381,000. Petitioner also sought cancellation of executive stock options (hereinafter the "plans") benefiting the respondents and approved by CDC stockholders pursuant to faulty proxy statements containing material misrepresentations and ommissions issued by CDC during the period of the illegal payments. Petitioner alleged violation of §14(a) of the Securities Exchange Act of 1934, (the "Act") 15 U.S.C. §78n(a) and the rules promulgated [Rule 14 a 9(a), 17 C.F.R. §240.14a-9] thereunder which prohibit, *inter alia,* corporations and management from issuing false and/or misleading proxy statements while soliciting shareholder votes for any transaction seeking shareholder approval.

The respondents sought Summary Judgment dismissal of Petitioner's claims because of the opinion of an autonomous "Special Litigation Committee" which found that Petitioner's lawsuit was not in the best interest of CDC and recommended that CDC move for Summary Judgment. The Directors of CDC then exercised their "Business Judgment" pursuant to *state law* and decided not to proceed in any fashion against the respondents, neither on common law counts nor on claims asserted under the Act. The Summary Judgment Motion was granted in the District Court without any discovery by Petitioner and affirmed below. The Question Presented relates to the summary dismissal of the claims as follows:

> Does a *state rule of law* known as the "Business Judgment" rule relating to the power of a board of directors of a corporation to operate and manage the business affairs of a corporation preempt and preclude the right of a shareholder to maintain a non-frivolous derivative shareholders' action pursuant to Rule 23.1 of the Federal Rules of Civil Procedure under the Federal proxy and reporting rules and the federal policies and interest thereby articulated which require full and honest disclosure in proxy solicitations mandated by Section 14(a) of the Act, 15 U.S.C. Sec. 78n(a) and Rule 14a9(a), 17 C.F.R. §240.14A-9, promulgated thereunder (set out in pertinent part after this paragraph), when such shareholders' action seeks to void the substantial executive compensation and benefit plans approved by shareholders pursuant to false proxy statements which did not disclose criminal acts committed by the very individuals who approved and issued the faulty proxy statements and who benefitted from the faulty solicitation of the shareholders' votes in favor of such executive compensation and benefits, thereby causing both the transaction and the damage sought to be challenged by the complaining shareholders.

STATUTES INVOLVED

SECURITIES EXCHANGE ACT OF 1934
SECTION 14(a)
15 USC §78n(a)

§78n. Proxies; tender offers

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

* * * * * * * *

SECURITIES EXCHANGE RULE 14a(9)(a)
17 C.F.R. §240.14a-9

Rule 14a-9(a) False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

STATEMENT OF THE CASE

Petitioner filed a derivative action pursuant to Rule 23.1 of the Federal Rules of Civil Procedure on behalf of all shareholders of CDC seeking damages and injunctive relief against seven officers and directors of CDC (Respondents) for violation of the proxy rules set out in Section 14(a) of the 1934 Securities Exhange Act (Act), the rules promulgated thereunder [Rule 14a-9(a), 17 C.F.R. §240.14a-9] and for waste of corporate assets. Petitioner alleged in the Complaint that Respondents, from 1967 to 1976, had violated the proxy requirements of Section 14(a) of the Act (15 U.S.C, Sec. 78n), the proxy rules promulgated thereunder, prohibiting misleading statements, [Rule 14a-9, 17 C.F.R. §240.14a-9] and breached their fiduciary duties to Petitioner in derogation of state law. (Complaint, pars. 17 to 30, Appendix C. *infra,* pp. A-25 - A-29.

The violation of the Act consisted, *inter alia,* that Respondents had failed to report in any report, proxy statement, registration statement, or any annual report that the Company had made illegal payments from 1967 to 1976 to foreign nations; nevertheless, the defendants benefitted from their own illegal acts by granting of stock options and benefits, which benefits and options were sought to be set aside by Petitioner. (Complaint, pages 4-7, App. C, *infra,* p.). On April 26, 1978, CDC voluntarily pleaded guilty to various felony charges under federal law in connection with those illegal payments. CDC paid fines in excess of 1.3 million dollars in civil and criminal fraud penalties. (Complaint, page 3, App. C, *infra,* p. .) The paragraphs of the Complaint relating to the "Plans" which *inter alia* Petitioner claims supports transactional causation of the defendants' acts and which underly a cause of action under §14a of the Act are paras. 14-16, 20-25, pgs. 3-5, App. C, *infra* pp. A-25 - A-29, which state verbatim as follows:

> 14. During the period of November, 1967 to May, 1976, the defendants had knowledge that such acts violated the

law and that CDC would be exposed to substantial criminal and civil fraud penalties and fines.

15. The defendants held options to purchase substantial amounts of shares of CDC's common stock at exercise prices far below the presently prevailing market price of such shares and that the defendants actually exercised certain stock options at exercise prices which personally profitted the defendants, all done while having the knowledge referred to in numerical paragraphs 13 and 14, above.

16. The defendants caused CDC to plead guilty to certain federal criminal charges arising out of the facts alleged above and the CDC was fined and has paid $1,381,000 in criminal and fraud penalties when in fact the defendants are personally responsible for such fines and penalties.

* * * * * * * *

20. As a result of the facts hereinabove alleged, the individual defendants herein have violated the provisions of Sections 13(a) and 14(a) of the 1934 Act and the Commission's rules and regulations promulgated thereunder.

21. During the relevant period, the Board of Directors of CDC passed a Resolution which they caused to be submitted for approval to and which thereafter was approved by the shareholders of CDC at various shareholders meetings adopting an Executive Performance and Retention Plan and a 1970 Qualified-Non-Qualified Stock Option Plan, sometimes referred to herein as the "Plans".

22. Among the major provisions of the Plans were the following:

(a) Officers and key employees of CDC and its subsidiaries are eligible to receive options under the Plan.

(b) The total number of common shares in respect to which options may be granted shall not exceed 1,446,000 shares.

(c) Such Plans shall be administered by the Stock Option and Executive Compensation Committee of the Board of Directors.

(d) The price at which an optionee may exercise his option for the common shares of CDC shall not be less than the market value of such shares on the date the option was granted.

23. In connection with several of CDC's annual shareholders meetings which sought the shareholders' approval of the Plans, those defendants who were then members of the Board of Directors of CDC, acting in concert with the other defendant-officers and/or employees of CDC and it subsidiaries, by use of the mails and other instrumentalities of interstate commerce, solicited proxies from the shareholders of CDC pursuant to the Proxy Statements mailed to them and filed with the Securities and Exchange Commission. Such Proxy Statements were false and misleading because they concealed and failed to disclose material information concerning the willful, improper and illegal misappropriation of corporate funds as herein set forth and the possible civil and criminal penalties applicable thereto.

24. The members of the Board of Directors of CDC did conspire to conceal the illegal and improper conduct as set forth above in an attempt to maintain the market price of CDC shares at an artifically inflated level.

25. The approval by the shareholders of CDC of the Plans was and is null and void and should be set aside.

(Complaint, paras. 14-16, 20-25, pgs. 3-5, App. C, *infra* pp. A-25 - A-29.)

Petitioner requested an opportunity to review the same documents that the "Special Committee", who recommended the application of the "Business Judgment" rule, had reviewed. This request was not answered. (Appendix D, *infra*, pp. A-29 - A-33.)

Respondent CDC is a Delaware Corporation having its principal place of business in Minnesota. There are no proxy rules promulgated by the States of Delaware or Minnesota, but only under the Act.

Respondent's Motion for Summary Judgment was granted and Affirmed on the basis of a *State Business Judgment Rule,* while the Court below—in disposing of the federal proxy claim under the Act—misapprehended the law and stated the following:

> But he (Petitioner) has made *no showing* that the details of those payments were relevant and material facts which a reasonably prudent stockholder would have considered in voting on the questions presented for stockholder approval.

Court of Appeals, Opinion and Order, p. 16; App. A, p. A-13.

And:

Several courts have refused to find a federal remedy under §14(a) for secret, illegal corporate payments. They have required "transactional causation" as an essential element of a §14(a) cause of action: the harm to plaintiff-shareholders must have resulted from the corporate transactions which were authorized as a result of the false or misleading proxy solicitations. See *In re Tenneco Securities Litigation, supra,* 449 F.Supp. at 531; *Lewis* v. *Elam, supra,* Fed. Sec. L. Rep. (CCH) at ¶96, 103. Any injury to CDC shareholders from the corporation's illegal foreign payments stems directly from the corporate waste and

> mismanagement involved in authorizing those payments and not from allegedly misleading proxy solicitations dealing with unrelated corporate business matters.
>
> *Court of Appeals, supra, pg. 17, App A, pp. A-13 - A-14.*

It must be said that the "no showing" did not result from petitioner's temerity, but from the refusal of the District Court to permit discovery and the lack of "transactional causation" does not comport with this Court's pronouncements. See post, pp. 18 to 20. These misapprehensions are treated more fully hereinafter.

REASONS FOR GRANTING THE WRIT

The decision below, permitting a *State Business Judgment Rule* to terminate a federally created remedy where there are no state remedies, directly conflicts with the underlying federal policy and attendant remedies as pronounced by this Court in *Burks* v. *Lasker,* US , 60 L. Ed 2d 404 (May 14, 1979) and *Case* v. *Borak,* 377 US 426, 12 L.ed 2d 423, 845 S.Ct. 1555, which policy has totally preempted state law as to remedies for the abuses of proxy solicitations by management in contravention of §14(a) of the 1934 Act, 15 U.S.C. §78n, and Rule 14a(9)(a), 17 C.F.R. §240.14a-9, promulgated thereunder. Additionally, the decision now being appealed raises issues of substantial public importance relating to the proper exercise of corporate suffrage.

THE DECISION BELOW IS IN CONFLICT WITH AND INCONSISTENT WITH THE PRINCIPLES RECENTLY ENUNCIATED IN *BURKS* V. *LASKER,* US , 60 L.ED.2D 404. AS TO THE AUTHORITY OF INDEPENDENT CORPORATE DIRECTORS TO DISCONTINUE SHAREHOLDERS LITIGATION.

In *Burks,* Decided *May 14, 1979, this Court held that:*

> " . . . federal courts should apply *state law* governing the *authority of independent directors* to *discontinue derivative suits* to the extent such law is *consistent* with the *policies* of the Investment Company and Investment Advisors act . . . "
>
> *60 L.Ed2d 417.*

However, in *Burks,* there was an existing body of *state law* dealing with the duties of fiduciaries which was compatible with additional federal law and the *policies* embodied within the Investment Advisors Act. At bar, there is no body of *state law* policies which support or supplement federal policy dealing with

the control and regulation of proxy statements. Shareholders would be without any remedy were directors permitted to discontinue this litigation by a majority vote. Such a result would simply terminate, nullify, and prohibit a federal statute serving important purposes in today's securities markets and in support of corporate suffrage. To permit the decision below to stand would permit corporate directors as a matter of law to vitiate a Section 14(a) of the Act claim brought derivatively no matter how egregious the conduct. Proxy regulation is solely addressed by the Act, Section 14(a) thereof and Rules promulgated thereunder, and any state law to the contrary is wholly inconsistent therewith.

A state rule of law cannot displace or terminate a federal right under a well articulated and identifiable federal policy when there are *no* state remedies covering proxy solicitations available to the persons seeking relief. This Court in *Burks,* supra at 60 L.Ed 2d, 413-414, stated:

> Although "(a) state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson* v. *Wegmann, supra, at 593, 56 L.Ed.2d 554, 98 S.Ct. 1991, federal courts must be ever vigilant to insure that application of state law poses "no significant threat to any identifiable federal policy or interest . . ." Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68, 16 L.Ed.2d 369, 86 S.Ct. 1301 (1966). See *Auto Workers* v. *Hoosier Corp.,* 383 U.S. at 702, 16 L.Ed.2d 192, 86 S.Ct. 1107. Cf. *Brown* v. *Western R. of Alabama,* 338 US 294, 298, 94 L.Ed 100, 70 S.Ct. 105 (1949). And, of course, this means that "unreasonable *Wallis* v. *Pan-American Petroleum Corp.* supra, at 70, 16 L.Ed2d 369, 86 S.Ct. 1301 or specific aberrant or hostile state rules," *United States* v. *Little Lake Misere Land Co.,* 412 US 580, 596, 37 L.Ed2d 187, 93 S.Ct. 2389 (1973), will not be applied. See, e.g., *Levitt* v. *Johnson,* 334 F2d 815, 819-820 (CA1, 1964.) The "con-

sistency" test guarantees that "nothing that the state can do will be allowed to destroy the federal right." *Board of Commissioners* v. *United States,* 308 US, at 350, 84 L.Ed 313, 60 S.Ct. 285, and yet relieves federal courts of the necessity to fashion an entire body of federal corporate law out of whole cloth.

Further, in a footnote this Court stated in *Burks,* supra, 60 L. Ed 2d, 413:

> But as long as private causes of action are available in federal courts for violation of the federal statutes, this enforcement problem is obviated. The real concern, therefore, is not that state laws be uniform, but rather that the laws applied in suits brought to enforce federal rights meet the standards necessary to insure that the "prohibition of (the) federal statute . . . not be set at naught," *Sola Electric Co.* v. *Jefferson Co.,* 317 US 173, 176, 87 L.Ed 165, 63 S.Ct. 172 (1942). The "consistency" requirement described in text guarantees that state laws failing to meet these standards will be precluded.

THE DECISION BELOW IS IN CONFLICT WITH AND INCONSISTENT WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN *J. I. CASE CO* V. *BORAK,* 377 US 426, 12 L. Ed. 2 423, 84 S.Ct. 1555. AS TO THE FRE-EMPTION BY FEDERAL LAW OF RULES RELATING TO THE ACCURACY OF PROXY STATEMENTS.

This Court in *J. I. Case Co.* v. *Borak,* 377 US 426, 12 L.Ed 2d 423, 84 S.Ct. 1555, perhaps the leading case articulating federal preemption of an area of law which has no counterpart in state law, held that a claim under §14(a) is a valuable and inalienable federal right which may be asserted as a private cause of action in federal courts. The public policy interest is pronounced at 12 L.Ed 2d 427, 428:

The purpose of Sec. 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation. The section stemmed from the congressional belief that "(f)air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." HR Rep No. 1383, 73rd Cong, 2d Sess, 13. It was intended to "control the conditions under which proxies may be solicited with a view to preventing the recurrence of abuses which . . . (had) frustrated the free exercise of the voting rights of stockholders." Id., at 14. "Too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73rd Cong, 2d Sess, 12. These broad remedial purposes are evidenced in the language of the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors," which certainly implies the availability of judicial relief where necessary to achieve that result.

The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone, but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforce-

ment of the proxy rules provides a necessary supplement to Commission action.

THE DECISION BELOW IS IN CONFLICT WITH THE LEGISLATIVE POLICIES AND INTENT OF THE ACT.

The need for truthful proxy statements affect the policy behind the Act in that corrective actions which could have been taken were not taken because the shareholders were lulled into approving transactions improperly set out in the faulty proxies. At bar, the executive benefits approved by shareholder vote as late as 1976 are the transactions which suggest self-dealing by management who hid behind the mask of improper proxy solicitations. Could any type of transaction be more within the ambit of the Act and its intented objective of insuring fair corporate suffrage, protecting investors and permitting timely, corrective actions? See H.R. Rep. No 1383, 73d Cong., 2d Sess. (1934); S. Rep. No. 792, 73d Cong., 2d Sess. (1934). There are no equivalent debates in the legislatures of Delaware or Minnesota or in the legislative history any statute resembling the Act.

In a nutshell, the policies set out in both the 1933 Securities Act and the 1934 Securities Exchange Act permitting shareholders to exercise the full range of their opportunities to influence corporate decision making can only be secured by federal enforcement thereof. There are no state counter parts. The burden of state enforcement, assuming a non-existent state law re: proxy statements, are exemplified by the recurring requirements of a substantial bond or percentage stock ownership as a condition of a derivative action. These conditions are not present in a federal action

Yet, we return to the central issue: What is the federal policy underlying the Act and why is it important to enforce it? After the stock market crash of 1929, it was clear that there was a general failure of state regulations of the securities market. There was a crying need of federal law to prevent misleading or fraudulent transactions and to give the average shareholder greater understanding of his investment by insuring fair corporate suffrage as well as assuring this same investor redress when such suffrage has been adulterated by the lack of disclosure. See Hanna & Turlington, Protection of the Public under the Securities Exchange Act, 21 Va. L. Rev. 251 (1935); Legislation, Federal Regulation of Securities: Some Problems of Civil Liability, 43 Harv. L. Rev. 107 (1934).

Informed voting based upon the truth produced by accurate information and full explanations are essential, particularly when corporate management seeks to benefit themselves. See 73 Cong. Rec. 7925 (1935); Tracy & MacChesney, The Securities Exchange Act of 1934, 32 Mich. L. Rev. 1025 (1934). Their policies have been long recognized by this Court. See *Mills* and *Case,* supra.

The Senate Report on the Act noted that "too often proxies are solicited without explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." S. Rep. No. 792, 73d Cong., 2d Sess. (1934). These rights of fair corporate suffrage should "attach to every security bought on a public exchange" and should not be applied inconsistently, depending on the magnitude of loss involved. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934). A fortrair; when the proxies are used to take votes "from the stockholders for their (insiders) own selfish advantages valuable property rights." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 14 (1934). The Seventy-Third Congress was prescient as to the instant litigation.

A further factor is present herein which sustains the right of plaintiff to assert his 14(a) claims under the Act. As stated supra, there is no remedy in state law for proxy disclosure violations. To allow the federal rights to be adjudicated the Petitioner herein must be granted a trial so as to give meaning to the purposes of the Act, and the "necessary supplement to Commission action." As this Court in *Borak,* supra, stated in supporting the federal action:

> And if the law of the state happened to attach no responsibility to the use of misleading proxy statements, the whole purpose of the section might be frustrated.
>
> 377 US at 434-435, 84 S.Ct. at 1561, 12 L. Ed 2d at 429.

If the decision of the Eighth Circuit is permitted to be cited as controlling, hereafter, the basic shareholder rights developed by this Court in the cited cases and the underlying Congressional Policies will be for naught. Petitioner respectfully requests the Court to decide the confliciting issues presented herein.

THE COURT OF APPEALS DECISION CONFLICTS WITH CASE LAW AS ENUNCIATED BY OTHER CIRCUIT COURTS OF APPEALS AND THE EIGHTH CIRCUIT ITSELF AS TO THE FEDERAL PRE-EMPTION OF RULES RELATING TO FULL DISCLOSURE IN PROXY STATEMENTS.

The Decision below indiscriminately applied the business judgment rule to a case with facts that the Court clearly did not understand and to which clearly distinguishable case law was applied. In dismissing the Petitioner's Complaint, the Court of Appeals below effectively ended the right of a shareholder to redress wrongs for which the Act was created, a right which they had previously upheld.

The Eighth Circuit had previously held that in reference to §14(a) of the Act:

> "(C)ongress intended to cover the entire field of solicitation for corporate control and all the various solicitation situations which might arise from time to time, whether conventional, novel, irregular or unorthodox." *Reserve Life Insurance Co.* v. *Provident Life Insurance Co.,* 499 F.2d 715 (8th Cir. 1974), citing *Greater Iowa Corporation* v. *McLendon* 378, F.2d 783, 796 (8th CIr., 1967).

And further, in *Greater Iowa,* the Eighth Circuit stated:

> The purpose of the Section becomes clear, to provide full and honest disclosure by those who are seeking to maintain or gain control of a corporation through solicitation of the corporate voting rights of the shareholders. Corporate suffrage is an important incident of corporate ownership and is a right deserving of careful protection. Consequently, standards of conduct have been established for parties who seek the voting rights of others, and all contestants for these voting privileges are held to the same high standard of fair play and open disclosure.
>
> Supra at 795.

The policy expressed by the Eighth Circuit as indicated by this language is not reflected in the affirmation of the dismissal below. In conflict with the basic federal policy as enunciated in *Case* v. *Borak,* supra, and its own holdings the Court of Appeals stated that "Consequently, we determine that Abbey's §14(a) claim is also at best marginally related to the federal policies underlying that section." *Court of Appeals, Decision and Order, p. 17; App. A, pp. A-13 - A-14. This Decision blatently conflicts with even that Court's own case law cited in supporting the dismissal and fails to define "marginally".*

For the proposition that:

> *Several courts have refused to find a federal remedy under* §14(a) for secret, illegal corporate payments. They have required "transactional causation" as an essential element of a §14(a) cause of action: the harm to plaintiff-shareholders must have resulted from the corporate transactions which were authorized as a result of the false or misleading proxy solicitations,

the Court of Appeals below cites two cases, neither of which were Circuit Court decisions and neither of which resembled their own promulgations: *In re Tenneco Securities Litigation,* 449 F.Supp. 528 (S.D.Tex, 1978); and *Lewis* v. *Elam,* [1977-78 Transfer Binder] Fed. Sec. L.Rep. (CCH) ¶96, 013 (S.D.N.Y., 1977). The factual situations of these cases have little resemblence to the within facts. In *Tenneco* the *only* corporate transaction involved was the election of directors, 449 F.Supp. at 531, and further the *only* §14(a) violation alleged was the failure of the director candidates to include in their proxy solicitations the statement that they had made the allegedly illegal payments, 449 F.Supp., 531. Similarly, in *Lewis* v. *Elam,* the plaintiff did not show "causation between the alleged proxy violations and the transaction causing the harm of which plaintiff now complains." [1977-78 Transfer Binder] ¶96, 013, p. 91, 555. There were no allegations of improperly approved executive compensation plans.

TRANSACTIONAL CAUSATION HAS BEEN PLEADED AND IS PRESENT BY OPERATION OF LAW

Petitioner's claims as appear in the Complaint, paras. 14-16, 20-25, pgs. 3-5, Appendix C, infra. pp. A-25 - A-29, relate to be sure, to the fact that the defendants did not disclose material facts relating to illegal foreign payments but, primarily, the claims under the Act relate to the fact that those same defendants who solicited shareholder proxies directly benefited from their misrepresentations since shareholders were not told facts which a reasonable shareholder would consider important in considering the merits of approving the executive stock option plans as requested by Respondents. Petitioner claims that such approval of the Plans was null and void due to proxy violations of §14(a) of the Act. Complaint, para. 25; p. 5, App. C, infra. p. A-27. These issues while formed by the pleadings were not decided or controlled by the cases cited by the Court of Appeals below. However, the required "transaction causation" is present even though ignored by the Court below.

Petitioner has alleged that the transaction sought to be accomplished wa[s] approved pursuant to solicitation of proxies from shareholders. The essential link in accomplishing this goal was the illegal solicitation by proxy of shareholder votes to consummate that transaction. Complaint, App. C, pars. 20-25, infra. pp. A-25 - A-27.

What this Court did in *Mills* was to elimate "the need for *proof* of any causal relationship and in effect substitute a *presumption* of causation in favor of a plaintiff when both a material misstatement or ommission and the need for non-management votes had been established. This presumption may be stated as follows: if the proxy statement contains a 'material' defect and if at least some votes must be obtained from minority shareholders for a transaction to be approved, then a 'sufficient showing' has been made of a causal relation between the defective proxy statement and the effected transaction to entitle the plaintiff to some relief . . . " *Causation and Liability in Private Actions for Proxy Violations,* Yale Law Journal, Vol. 80, pg. 107 at 110 (1970); *Mills,* 396 US 385.

There is no question that the materiality test has been met since this Court has stated that a fact is material if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Industries, Inc.* v. *Northway, Inc.,* 426 US 438 at 449, 96 S.Ct. 2126, 48 L.Ed. 2d 757 (1976). It is doubtful that knowledge of improper corporate payments would not be material to the average shareholder, particularly when that shareholder is approving the issuance of stock options to corporate directors and officers.

The Court of Appeals below, in dismissing Petitioner's claims stated that:

> Any injury to CDC shareholders from the corporation's illegal foreign payments stems directly from the corporate mismanagement involved in authorizing these payments and not from allegedly misleading proxy solicitations dealing with unrelated corporate business matters.

Court of Appeals Decision, pg. 17, App. A, pp. 13-14.

The conclusion of the lower Court is not at all what Petitioner claimed and respresents a complete misunderstanding of a basic issue set forth in the Complaint. The claim under §14(a) of the Act deals exclusively with the loss visitied upon shareholders since Respondents used proxy votes to approve the benefits accorded the respondents out of corporate assets by permitting them to avail themselves of stock options and bonuses out of corporate assets.

The Eighth Circuit Court of Appeals seems to have reversed their earlier decisions in *Reserve Life Insurance Co.* v. *Provident Life Insurance Co.* and *Greater Iowa Corp.* v. *McLendon,* supra.

If the decision of the Eighth Circuit in this matter is permitted to be cited as controlling law it will effectively terminate shareholder proxy rights. Petitioner asserts that the same rational for supporting the private cause of action in *J. I. Case* v. *Borak* is present here. The Court therein stated:

> We therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose. As was said in *Sola Electric Co.* v. *Jefferson Electric Co.,* 317 US 173, 176, 87 L.Ed. 165, 168, 63 S.Ct. 172 (1942):
>
> > "When a federal statute condems an act as unlawful, the extent and nature of the legal consequences of the consequences of th condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted."
> >
> > *id.* at 428.

CONCLUSION

For these reasons a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 79-1058

Arthur N. Abbey, on behalf of himself and on behalf of all shareholders of Control Data Corporation, Derivatively,

Appellant,

v.

Control Data Corporation, a nominal defendant herein, and Norbert R. Berg, Thomas G. Kamp, William R. Keye, Robert M. Price, Robert D. Schmidt, William C. Norris, Marvin G. Rogers, and the present and former officers and employees of Control Data Corporation, and its subsidiaries who were granted stock options which have been or may be exercised by them pursuant to the Executive performance and Retention Plan and Control Data Corporation's Employees' Non-Qualified Stock Option Plan, hereinafter called the "Plans",

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: May 18, 1979
Filed: August 6, 1979

Before LAY, BRIGHT and HENLEY, Circuit Judges.

HENLEY, CIRCUIT JUDGE.

Arthur N. Abbey appeals the judgment of the district court[1] dismissing his stockholders' derivative suit against Control Data Corporation (CDC). *Abbey* v. *Control Data Corp.*, 460 F.Supp. 1242 (D. Minn. 1978). We affirm.

Abbey brought this class action pursuant to Fed. R. Civ. P. 23.1 to compel seven senior officers and directors of CDC to repay $1,381,000 in civil and criminal penalties levied on CDC as a result of the corporation's guilty plea to criminal charges. Those charges stemmed from illegal payments admittedly made by the corporation to certain foreign entities.[2] Abbey also sought the cancellation of several executive stock options approved by CDC stockholders during the period in which the payments were made, as well as renumeration for attorneys' fees he incurred in litigating these claims on behalf of himself and all other CDC stockholders.

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[1] The United States District Court for the District of Minnesota, The Honorable Edward J. Devitt, Chief District Judge, presiding.

[2] CDC management initiated an internal investigation of the illegal payments in 1976. The corporation voluntarily disclosed its findings to CDC stockholders through proxy materials and reports filed with the Securities and Exchange Commission. The Justice Department subsequently conducted a criminal investigation into CDC's foreign business activities and filed charges against it. CDC pleaded guilty to violating 18 U.S.C. § 1343 and 31 U.S.C. § 1059, and judgment was entered against it before the United States District Court for the District of Columbia. *United States* v. *Control Data Corp.*, Criminal No. 78-00210 (D. D.C. 1978). No director or officer of CDC was a named defendant in the criminal action, and the Justice Department agreed not to disclose publicly the details of CDC's illegal payments so as to ensure the safety of CDC employees involved in those payments. CDC submitted uncontested affidavits to the district court stating that none of the named defendants here were directly involved in the illegal payments charged in the criminal action.

Abbey asserted that by secretly diverting corporate funds to make illegal foreign payments, CDC and the named defendants had violated the federal securities laws and various common law corporate fiduciary principles which create stockholder remedies for corporate waste and mismanagement. The securities law claims charged violations of §§ 13(a) and 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78(m) and (n), which prohibit corporations from including false and misleading statements in proxy solicitations and in registration documents filed with the Securities and Exchange Commission. The alleged "false and misleading statements" obviously relate to CDC's failure to give its stockholders notice of the foreign payments in the proxy and registration materials released during the payment period.

CDC's board of directors responded to Abbey's suit by creating an autonomous "Special Litigation Committee" to investigate the charges. The committee was composed of seven of CDC's "outside" directors—persons holding responsible positions in government and business. No committee member had been named as a defendant, and there is no indication that any member was involved in or had contemporaneous knowledge of the foreign payments. The committee elected to retain independant counsel and conducted a plenary investigation of Abbey's charges. The named defendants were interviewed, and Abbey was invited to present his grievances in detail. He declined this invitation.

The committee determined that legal action by CDC against the defendants was not in the best interest of the corporation because: (1) the defendants had not been directly involved in the payments, nor had they personally profited from them; (2) the defendants had fully cooperated with the Justice Department and the committee; (3) legal action against the defendants could significantly impair their ability to manage corporate affairs; (4) the foreign payments were a customary business practice at the time they were made and were intended

to serve the business interest of CDC; and (5) disclosure of the details of the payments might endanger certain CDC employees and would nullify the Justice Department's agreement with CDC to treat the results of its criminal investigation as confidential, *see* n.2, *supra*. At the close of its investigation, the committee directed its counsel to move for summary judgment of behalf of CDC. The motion was supported by affidavits detailing the above findings and conclusions. Abbey filed no opposing affidavits and rested on his pleadings. The district court entered summary judgment against him.

The district court based its decision on the "business judgment rule" which, in general, vests responsibility for decision-making in the corporation's board of directors and precludes stockholders from disrupting board decisions through derivative actions where the board has determined the actions are not in the corporations's best interests. As the district court noted, however, an exception applies where the board's decision to bar the derivative action is made in bad faith or where the directors, themselves, are subject to personal liability in the action and cannot be expected to determine impartially whether it is warranted. 460 F.Supp. at 1244, *citing United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261 (1917). The district court did not invoke that exception since CDC's independent litigation committee provided the "unprejudiced exercise of judgment" contemplated by the business judgement rule. 244 U.S. at 264.

For reversal, Abbey asserts that the business judgment rule is inapplicable where the defendant-directors in a derivative suit are charged with criminal misconduct or violations of the federal securities laws. The district court rejected this contention, relying in part on a series of decisions from the Southern District of New York which appear to hold that the rule applies to any reasonable, good faith determination by an autonomous board of directors that the action is not in the best interests of the corporation 460 F.Supp. at 1245, *citing Gall v. Exxon*

Corp., 418 F.Supp. 508 (S.D. N.Y. 1976); *Bernstein v. Mediobanca Bancadi Credito*, 69 F.R.D. 592 (S.D. N.Y. 1974). *See also Rosengarten v. Int'l Tel. & Tel. Corp.*, 466 F.Supp. 817 (S.D. N.Y. 1979). As in the case at bar, the district courts in *Rosengarten* and *Gall* invoked the business judgement rule to terminate derivative actions brought under the federal securities laws to recover illegal foreign payments.

Both before the district court and in his appellate brief, Abbey relied heavily on *Lasker v. Burks*, 567 F.2d 1208 (2d Cir. 1978), in arguing that *Rosengarten* and *Gall* were wrongly decided. In *Lasker* the Second Circuit restricted the scope of the business judgment rule by holding that "disinterested directors of an investment company do not have the power to foreclose the continuation of nonfrivolous litigation brought by shareholders against majority directors for breach of their fiduciary duties." 567 F.2d at 1212. That decision was based upon the court's understanding of the congressional intent and public policies underlying the federal Investment Company and Investment Advisors Acts of 1940 and the "unique nature of the investment company and its symbiotic relationship with its investment advisors." 567 F.2d at 1212 *n.* 14.[3]

Just prior to oral argument before this court in the present case, however, the *Lasker* decision was reversed on appeal by the Supreme Court. *Burks v. Lasker*, 99 S.Ct. 1831 (1979). The Court apparently did not go so far as to hold that corporations in all circumstances may exercise their good faith, independent business judgment to terminate derivative actions alleging viola-

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[3]The district court distinguished *Lasker*, reasoning that the public policies underlying the investment company acts could not properly be compared to those underlying the securities registration act involved here. 460 F.Supp. at 1245. Also, the Second Circuit had limited its decision to derivative actions brought against investment companies and did not reach "questions of the exercise of similar power by directors of other types of corporations." 567 F.2d 1212 *n.* 14.

tions of federal law.[4] But it did stress that "federal courts should apply state law governing the authority of independent directors to discontinue derivative suits to the extent such law is consistent with [the federal statutes involved.]" 99 S.Ct. at 1841. Thus, federal statutes such as the Investment Company Act or the Securities and Exchange Act "do not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless 'their application would be inconsistent with the federal policy underlying the cause of action.' " 99 S.Ct. at 1837, *citing Johnson v. Rwy. Express Agency,* 421 U.S. 454, 465 (1975).

The Supreme Court's opinion in *Lasker* is particularly helpful here in that it sets forth a two-stage analysis which guides us in our present task.[5] We first determine whether state law permitted CDC's committee of outside directors to terminate Abbey's derivative action. And, if so, we then determine whether that termination impinged upon the federal policies underlying Abbey's securities law claims. 99 S.Ct. at 1838.

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[4]The majority opinion in *Lasker* indicates that federal premption considerations, such as the strength of the federal policy involved and the relationship of that policy to the plaintiff's cause of action, are controlling factors in determining the extent to which state law may operate to terminate plaintiff's federal claims. 99 S.Ct. at 1835-37. This reading is relected in the concurring opinion of Mr. Justice Blackmun. 99 S.Ct. at 1841. Justices Stewart and Powell, however, could not agree with "implications" in the majority opinion that there was "any danger that state law will conflict with federal policy"; and they found "no possible conflict between this generally accepted principle of state law [*i.e.,* the business judgment rule] and the federal statutes in issue." Consequently, they view the issue on remand in *Lasker* as a narrow one: "whether the state law here applicable recognizes this generally accepted principle and thereby empowers the directors to terminate this stockholder suit." 99 S.Ct. at 1842 (Powell, J., concurring).

[5]In addition, *Lasker* is dispositive of Abbey's claim that the district court erred by failing to give notice of the dismissal of the derivative action to other CDC stockholders. The notice provisions of Fed. R. Civ. P. 23.1 do not apply to involuntary dismissals of such actions. 99 S.Ct. at 1841 *n.* 16.

The parties agree that since CDC is a Delaware corporation, we should look to the laws of that state to determine whether the corporation's committee of outside directors had the authority to terminate Abbey's derivative action. *See Beard v. Elster,* 160 A.2d 731, 735 (Del. 1960) (the internal affairs of Delaware corporations are controlled by the laws of that state). The procedure followed by CDC's board of directors in delegating its decision making authority to that committee was clearly an attempt to insulate the corporation from shareholder interference by meeting the requirements of the business judgment rule.[6] That longstanding rule is found in the common law of many states, and was early stated by Mr. Justice Brandeis in *United Copper Securities Co. v. Amalgamated Copper Co., supra,* 244 U.S. at 263-64.

> Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment . . . .

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[6]CDC was authorized to establish an independent committee of outside directors by 8 Del. C. § 141(c) which provides in pertinent part:

> Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which requrie it . . . .

See Michelson v. Duncan, 386 A.2d 1144, 1155 (Del. Ch. 1978).

See also Polin v. Conductron Corp., 552 F.2d 797, 809 (8th Cir.), *cert. denied*, 434 U.S. 857 (1977); *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963).

The courts of Delaware have often had occasion to apply the business judgment rule. For example, in *Puma v. Marriott*, 283 A.2d 693, 695 (Del. Ch. 1971), the plaintiff-shareholder brought a derivative action challenging the decision of the corporation's board of outside directors to acquire all of the stock of six smaller companies owned in part by several of the corporation's inside directors. Noting that plaintiffs had not charged bad faith or fraud on the part of the outside directors in approving this acquisition, the Delaware court dismissed the action.

> [S]ince the transaction complained of was accomplished as a result of the exercise of independent business judgment of the outside, independent directors whose sole interest was the furtherance of the corporate enterprise, the court is precluded from substituting its uninformed opinion for that of the experienced, independent board members . . . .

283 A.2d at 696. The *Puma* decision is consistent with the earlier pronouncement of the Delaware Supreme Court in *Beard v. Elster, supra*, 160 A.2d at 738, where it is stated:

> We think the fact that a disinterested Board of Directors reached [its decision to grant certain stock options] by the exercise of its business judgment is entitled to the upmost consideration by the courts in passing upon the results of that decision. Such has long been the law of this State. *Blish v. Thompson Automatic Arms*, 30 Del. ch. 538, 64 A.2d 581.[7]

Abbey has cited no Delaware cases holding that the applicability of the business judgement rule hinges on the nature of the plaintiff-shareholder's cause of action. And we find no merit to his argument that the rule is inapplicable where the defendant-directors are charged with criminal misconduct. As a matter of Delaware law, we agree with the district court that the rule apparently applies to any reasonable good faith determination by an independent board of directors that the derivative action is not in the best interests of the corporation. 460 F.Supp. at 1245. Contrary to Abbey's assertions, the committee's decision not to pursue his claims was not tantamount to a ratification by the committee of the underlying criminal acts alleged in his complaint.

> The decision not to bring suit with regard to past conduct which may have been illegal is not itself a violation of law and does not result in the continuation of the alleged violation of law. Rather, it is a decision by the directors of the corporation that pursuit of a cause of action absed on acts already consummated is not in the best interest of the corporation. Such a determination, like any other business decision, must be made by the corporate directors in the exercise of their sound business judgment. The conclusive effect of such a judgment cannot be affected by the allegedly illegal nature of the initial action which purportedly gives rise to the cause of action.

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[7]We are unpersuaded by Abbey's argument that *Mayer v. Adams*, 141 A.2d 458 (Del. 1958), holds to the contrary. That case did not involve the business judgment rule but dealt with a question of procedure under the Delaware code. The issue presented was whether a cause of action for fraud allegedly committed by a corporation's board of directors may be maintained by a minority shareholder without demand upon the corporations' stockholders collectively pursuant to rule 23(b) of the Delaware Courts of Chancery Rules.

Gall v. Exxon, supra, 418 F.Supp. at 518.

Since we determine that Delaware law authorized CDC's outside directors to terminate Abbey's derivative action, we turn now to the question whether termination of the litigation impinged upon the public policies underlying Abbey's federal securities law claims. He alleges that CDC violated §§ 13(a) and 14(a) of the 1934 Act by failing to disclose contemporaneously to its shareholders the illegal foreign payments which it now admits having made. Section 13(a) requires the issuers of registered securities to file with the SEC such reports as are"necessary and appropriate for the proper protection of investors and to insure fair dealing in the security." 15 U.S.C. § 78m. Section 14(a) governs proxy solicitations by the issuers of registered securities. 15 U.S.C. § 78n. The SEC's rules and regulations enacted pursuant to that section prohibit the use of false and misleading statements in such solicitations. Securities Exchange Rule 14a(9)(a); 17 C.F.R. § 240.14a-9.

The Section 13(a) Claim.

While § 13(a) requires the issuers of registered securities to file certain reports with the SEC, it does not expressly confer rights on private parties not proscribe any conduct as illegal. Thus, there is a serious question as to whether § 13(a) gives rise to an implied private cause of action. *See Touche Ross & Co. v. Redington,* 47 U.S.L.W. 4732 (U.S. June 18, 1979).[8] For pre-

[8]Several courts have held that §13(a) does not give rise to a private right to damages for injuries caused by its violation. *See In re Penn Central Securities Litigation,* 494 F.2d 528, 539-41 (3rd Cir. 1974); *McLaughlin v. Campbell,* 410 F.Supp. 1321 (D. Mass. 1976); *du Pont v. Wyly,* 61 F.R.D. 615 (D. Del. 1973); *Smith v. Murchison,* 310 F.Supp. 1079 (S.D. N.Y. 1970) (dictum). *Cf. Myers v. American Leisure Time Enterprises, Inc.,* 402 F.Supp. 213 (S.D. N.Y. 1975), *aff'd,* 538 F.2d 312 (2d Cir. 1976) (no private cause of action under §13(d) through identical reasoning). The rationale of these decisions is that the sole private remedy for violations of § 13(a) is afforded by § 18(a) of the Act which creates a private cause of action only in favor of persons who have *purchased or sold* securities in reliance on false or misleading statements contained in § 13 reports. This rationale gains

sent purposes we may assume without deciding that in some circumstances such a cause of action exists.[9] Even so, the extent to which the § 13(a) reporting provisions provide a federal remedy for ultra vires corporate actions such as illegal foreign payments remains uncertain.

In general, the anti-fraud provisions of the federal securities laws were designed to protect investors engaged in the purchase and sale of securities by implementing a policy of full disclosure. *SEC v. Capital Gains Bureau,* 375 U.S. 180, 186 (1963). Not all instances of corporate fraud or mismanagement fall within the scope of that protection. Indeed, derivative causes of action under state law for breach of fiduciary duties traditionally have provided the principal remedy whereby stockholders can recover damages on behalf of the corporation for corporate waste and mismanagement. As we noted in *Golub v. PPD Corp.,* 576 F.2d 759, 764 (8th Cir. 1978):

> [It] was not the purpose of the federal security laws to provide a federal cause of action for stockholders who have been damaged by mere corporate mismanagement or breach of fiduciary duty by those in charge of the affairs of the corporation. Controversies in those areas have traditionally been the subject of litigation in the state courts, and federal legislation in the field of securities regulation was not designed to draw such controversies into the federal courts in the absence of diversity of citizenship and the requisite amount in controversy.

collateral support from the recent Supreme court decision in *Touche Ross & Co. v. Redington, supra,* which found no implied private cause of action under the §17(a) reporting provisions of the 34 Act in part because of the limited private remedy created by § 18(a)

[9]The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided. *Burks v. Lasker, supra,* 99 S.Ct. at 1836 *n.* 5.

See also Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474-77 (1977); *Cort v. Ash,* 422 U.S. 66, 84 (1975); *Superintendent of Ins. v. Bankers Life & Cas. Co.,* 404 U.S. 6, 12 (1971); *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 562 F.2d 1040, 1048 (8th Cir. 1977), *cert. denied,* 435 U.S. 925 (1978).

We have carefully considered Abbey's § 13(a) claim and agree with the district court that it is at best weak. Illegal foreign payments cases clearly involve state law questions of breach of fiduciary duties. They should not be dealt with under the general disclosure provisions of the federal securities laws where it is apparent, as here, that the nondisclosure of such payments had little, if any, impact on the plaintiff's dealings in the corporation's stock. Several recent cases involving illegal foreign payments have adopted this rationale in dismissing the plaintiff's cause of action for failure to state a claim under § 13(a) or § 14(a). *See In re Tenneco Securities Litigation,* 449 F.Supp. 528 (S.D. Tex. 1978); *Lewis v. Elam* [1977-78 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,013 (S.D. N.Y. 1977); *Limmer v. Gen Tel. & Elect, Co.* [1977-78 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,111 (S.D. N.Y. 1977); *Levy v. Johnson* [1976-77 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 95,899 (S.D. N.Y. 1977).

The weakness of Abbey's § 13(a) claim obviously under cuts his argument that the federal policies underlying that section preclude the decision of the district court to dismiss his complaint. In the words of the district court, "it seems incongruous for plaintiff to argue based on the strong underlying public policy of the 1934 Act when that Act is only marginally applicable, if applicable at all, to this case." 460 F.Supp. at 1242. Thus, we determine that Abbey's § 13(a) claim was properly dismissed.

The Section 14(a) Claim.

The purpose of § 14(a) is to "prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J. I. Case Co. v. Borak,* 377 U.S. 426, 431 (1964). And the Supreme Court has recognized an implied private cause of action under that section in favor of stockholders who have been injured as a result of false or misleading proxy solicitations. 377 U.S. at 430-31. Abbey argues that § 14(a) has been violated here because CDC stockholders would not have voted to elect certain officers or to grant certain stock options had the fact of the illegal foreign payments been disclosed in the proxy solicitations relative to those decisions. But he has made no showing that the details of those payments were relevant and material facts which a reasonably prudent stockholder would have considered in voting on the questions presented for stockholder approval. *Golub v. PPD Corp., supra* 576 F.2d at 764. *See also Selk v. St. Paul Ammonia Products, Inc.,* 78-1644 (8th Cir. April 27, 1979). The corporation's uncontroverted affidavits outlining the results of its internal investigation indicate that none of the CDC officers or employees who benefitted from the challenged proxy solicitations were directly involved in the illegal payments. *See n. 2, supra.*

Several courts have refused to find a federal remedy under § 14(a) for secret, illegal corporate payments. They have required "transactional causation" as an essential element of a § 14(a) cause of action: the harm to plaintiff-shareholders must have resulted from the corporate transactions which were authorized as a result of the false or misleading proxy solicitations. *See In re Tenneco Securities Litigation, supra,* 449 F.Supp. at 531; *Lewis v. Elam, supra,* Fed.Sec.L.Rep. (CCH) at ¶ 96,013. Any injury to CDC shareholders from the corporation's illegal foreign payments stems directly from the corporate waste and mismanagement involved in authorizing those payments and

not from allegedly misleading proxy solicitations dealing with unrelated corporate business matters. Consequently, we determine that Abbey's § 14(a) claim is also at best marginally related to the federal policies underlying that section. The district court did not err in dismissing his complaint under the business judgment rule.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

ARTHUR N. ABBEY, on behalf of himself and on behalf of all shareholders of Control Data Corporation, derivatively, Plaintiff, vs. CONTROL DATA CORPORATION, et al Defendants	Civ. 4-78-187 **MEMORANDUM & ORDER** (Filed Dec. 8, 1978)

Floyd E. Boline, Chestnut, Brooks & Burkard, Minneapolis, Minnesota, and Gene Mesh, Gene Mesh Co. L.P.A., Cincinnati, Ohio, attorneys for plaintiff.

Richard G. Lareau, Oppenheimer, Wolff, Foster, Shepard & Donnelly, Minneapolis, and Daniel M. Gribbon and Charles Lister, Covington & Burling, Washington, D. C., attorneys for defendant Control Data Corporation.

Gerald E. Magnuson, Lindquist & Vennum, Minneapolis, Minnesota, attorney for individual defendants.

This shareholders' derivative action stems from illegal payments admittedly made by the Control Data Corporation (CDC) to foreign governments during the period of 1967 to 1976. On April 26, 1978, CDC pled guilty to criminal charges brought by the United States as a result of the illegal payments, and $1,381,000.00 in criminal and civil penalties were levied

against, and paid by, CDC. No individual directors or employees of CDC were charged in the criminal action. This action was commenced on May 4, 1978, and it seeks to compel seven directors of CDC to repay the amounts of the penalties to CDC. Cancellation of certain executive stock option plans approved by CDC stockholders during the period of the illegal payments also is sought. Plaintiff's claims are based on alleged violations of Sections 13(a) and 14(a) of the Securiuties Exchange Act of 1934 and common law corporate fiduciary principles. A "Special Litigation Committee" of the CDC Board of Directors has determined that this action is not in the best interests of CDC; relying on this determination, CDC and the seven individual defendants now move for summary judgment. That motion is granted.

The motion for summary judgment is based on the so-called "Business Judgment Rule." This rule stands for the basic proposition that most important corporate decisions are to be made by the corporation's board of directors, and a shareholder, through a court action, normally cannot disrupt those decisions. When applied to derivative actions, the business judgment rule operates to bar a shareholder action on behalf of the corporation when the board of directors determines that the action is not in the corporation's best interests. The rationale underlying the rule is obvious and sound; management of the corporation is vested in the board of directors, and shareholders who disagree with board decisions normally must seek change through the intracorporate structure, not through the courts. An exception to the rule applies, however, where the board's decision to bar the derivative action is made in bad faith, or where the board stands "in a dual relation which prevents an unprejudiced exercise of judgment." *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917) (J. Brandeis). *Accord, e.g., Stadin v. Union Electric Co.*, 309 F. 2d 912, 921 (8th Cir. 1962), *cert. denied* 373 U.S. 915 (1963). Such a dual relation, of course, exists in a case, such as the present

one, where the defendants being sued in the derivative action also are directors of the corporation. In that situation the directors, who as defendants are subject to personal liability, cannot be expected to determine impartially whether the derivative action against them is in the best interests of the corporation. Therefore, the business judgment rule normally does not bar a derivative action when the directors are defendants in the action.

CDC claims this exception to the business judgment rule does not apply to the present case. After plaintiff filed this suit, the board of directors of CDC appointed a "Special Litigation Committee" from among its members. The four directors on that committee are not defendants in this suit and they were delegated full and unconditional authority to determine whether plaintiff's derivative action is in the best interests of CDC. With the assistance of counsel otherwise unaffiliated with CDC, the committee conducted an extensive investigation and determined that the suit was not in CDC's best interests. This decision was based on the following considerations: none of the defendant directors had personal knowledge that the foreign payments were illegal; none of the defendant directors personally profited from those payments; the payments were intended to serve CDC's business interests; the litigation would seriously disrupt the effectiveness of a highly successful senior management team, to CDC's detriment; full public disclosure of the details of the foreign payments might prejudice CDC's present and future business activities and possibly even endanger the lives of some CDC employees; the defendant directors fully cooperated with the committee's investigation and with the investigations of the United States; and the United States, following its investigations, elected not to bring criminal or civil charges against the defendant directors. Based on these findings the committee directed CDC counsel to take the necessary steps to obtain dismissal of this case.

The issue on this motion therefore is whether the Special Litigation Committee's determination as to the best interests of CDC is sufficient under the business judgment rule to bar plaintiff's derivative action. Plaintiff does not contest the good faith of the committee's determination or the committee's independence from the defendant directors. Indeed, at oral argument counsel for plaintiff recognized that, given the impeccable credentials of the committee members and the thoroughness of their investigation, it would be impossible to establish bad faith or lack of independence on the part of the committee. Instead, plaintiff asserts, first, that the public policy underlying the Securities Exchange Act of 1934 requires that the business judgment rule not apply and, second, that the business judgment rule is inapplicable when defendant directors are accused of fraudulent or criminal conduct.

Plaintiff's first argument, that the public policy underlying the 1934 Act precludes application of the business judgment rule, must be rejected. Initially, the court notes that plaintiff's claims under Sections 13(a) and 14(a) of the 1934 Act are at best weak. Several cases of recent origin have dismissed similar illegal foreign payments cases for failure to state a claim under Sections 13(a) and 14(a). *See In re Tenneco Securities Litigation,* 449 F. Supp. 528 (S.D. Tex. 1978); *Lewis v. Elam,* [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,013 (S.D.N.Y. 1977); *Levy v. Johnson,* [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,899 (S.D.N.Y. 1977); *Limmer v. General Tel. & Elec. Corp.,* [1977-1978 Transfer Binder] Fed. Sec L. Rep. (CCH) ¶ 96,111 (S.D.N.Y. 1977). These cases have made the valid point that foreign payments cases such as the present one involve primarily questions of corporate waste and mismanagement, questions properly dealt with under state law, not federal securities law. *See also Sante Fe Industries, Inc. v. Green,* 97 S. Ct. 1292 (1977) (federal securities laws are not meant to federalize the law of corporations). Thus, it seems incongruous for plaintiff to argue based on the strong underlying public policy of the 1934 Act when that Act is only marginally applicable, if applicable at all, to this case.

A second consideration with respect to plaintiff's first argument is Eighth Circuit law. The Eighth Circuit has held the business judgment rule applicable to cases under the federal antitrust laws. *See Stadin v. Union Electric Co.,* 309 F.2d 912, 921-22 (8th Circ. 1962), *cert denied,* 373 U.S. 915 (1963); *Cosentino v. Carver-Greenfield Corp.,* 433 F.2d 1274, 1277 (8th Cir. 1970). Since the public policies underlying the civil liability provisions of the antitrust laws are at least as strong as those underlying the 1934 Act, this court must assume that the Eighth Circuit would apply the business judgment rule to 1934 Act cases as it does to antitrust suits.

Finally, plaintiff has cited no authority, and this court has found none, for the proposition that the business judgment rule is not applicable to 1934 Act derivative cases. The one case relied heavily upon by plaintiff, *Lasker v. Burks,* 567 F.2d 1208 (2d Cir.), *cert. granted,* 47 U.S.L.W. 3191 (Oct. 2, 1978), is inapposite. That case was a derivative action by a mutual fund shareholder against the fund's investment adviser and inside directors for mismanagement of the fund which resulted in significant losses to the fund. As in the present case, a special committee of nondefendant outside directors was appointed by the board of directors and that committee determined that the derivative action was not in the fund's best interest. The Second Circuit held that this determination did not bar the derivative action, irrespective of the good faith of the committee. *Lasker,* however, dealt with the Investment Company and Investment Advisors Acts of 1940 and the court's holding was specifically limited to cases arising under those Acts. 567 F.2d at 1212 n. 14. Although it expressed some skepticism as to the ability of such a committee to make an unbiased and objective decision, the court was concerned primarily with the "unique nature of the investment company and its symbiotic relationship with its investment adviser." *Id.* The *Lasker* court found a strong congressional intent under the 1940 Acts to protect mutual fund investors and the public from abuses inherent in the mutual fund industry, an intent that would be frustrated if disinterested

directors through the business judgment rule could bar derivative actions against the mutual fund's majority directors and investment adviser. The concern of the *Lasker* court cannot be carried over to the present case, since the public policy and congressional intent underlying the 1940 Acts cannot properly be compared with that underlying the 1934 Act. The 1940 Acts are detailed regulatory statutes; they differ fundamentally in purpose and design from the disclosure-oriented 1934 Act. *See generally* Motley, Jackson & Barnard, *Federal Regulation of Investment Companies Since 1940,* 63 Harv. L. Rev. 1134 (1950). Therefore this court finds plaintiff's relaince on the *Lasker* case to be misplaced.

Plaintiff's second argument is that the alleged conduct of the defendant directors was criminal, or at least fraudulent, and cannot be ratified by CDC or the Special Litigation Committee. Plaintiff appears to be correct that a corporation is powerless to ratify criminal acts of its agents. However, a decision by a corporation not to sue an agent who has allegedly committed criminal acts against the corporation does not constitute ratification of those acts. The business judgment rule applies to any reasonable, good faith determination by an independent board that the derivative action is not in the best interests of the corporation. *See, eg., Gall v. Exxon Corp.,* 418 F. Supp. 508 (S.D.N.Y. 1976); *Bernstein v. Mediobanca Bancadi Credito,* 69 F.R.D. 592 (S.D.N.Y. 1974). A board of directors, as in the present case, may have sound reasons for believing the lawsuit is not in the corporation's best interests, even if the corporation has a valid cause of action even if the alleged misconduct of the defendants was criminal or fraudulent. See *Gall v. Exxon, supra,* at 516-18. As Mr. Justice Brandeis once observed:

> Mere belief that corporate action, taken or contemplated, is illegal gives the shareholder no greater right to interfere than is possessed by any other citizen. Stockholders are not guardians of the public. The function of guarding the public against acts deemed illegal rests with public officials.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 343 (1936) (concurring). Plaintiff's second argument therefore must fail.

The court wishes to emphasize that the independence and good faith of the Special Litigation Committee are not at issue; plaintiff concedes that the Committee reached its decision in good faith and independent of any pressures and influence from the defendant directors. The concern expressed by the Second Circuit in *Lasker,* that such a committee would not "view with the necessary objectivity the actions of their colleagues in a situation where an adverse decision would be likely to result in considerable expense and liability for the individuals concerned," 567 F.2d at 1212, therefore is not present here.

Defendant's motion for summary judgment is GRANTED.

Dated: December 7, 1978.

/s/ EDWARD J. DEVITT,
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ARTHUR N. ABBEY, on behalf of himself and on behalf of all shareholders of Control Data Corporation, Derivatively, Plaintiff, - against - CONTROL DATA CORPORATION, a nominal defendant herein, and Norbert R. Berg, Thomas G. Kamp, Willim R. Keye, Robert M. Price, Robert D. Schmidt, William C. Norris, Marvin G. Rogers, and the present and former officers and employees of Control Data Corporation, and its subsidiaries who were granted stock options which have been or may be exercised by them pursuant to the Executive Performance and Retention Plan and Control Data Corporation's Employees' Non-Qualified Stock Option Plan, hereinafter called the "Plans", Defendants	**VERIFIED COMPLAINT** **Plaintiff Demands Trial By Jury**

Plaintiff, by his attorneys, GENE MESH CO., L.P.A., complaining of the defendants, alleges upon information and belief as to all allegations of the Complaint except for paragraphs 6 and 8 hereof, as follows:

1. Jurisdiction of this action is conferred upon this court and arises under the provisions of Section 27 of the Securities Exchange Act of 1934, (hereinafter "The 1934 Act"), U. S.C., Sects. 78aa, diversity of citizenship, 28 U.S.C., Sect. 1332(a), and the principles of pendent jurisdiction.

2. This action is not a collusive one to confer jurisdiction of a cause upon a Court of the United States of which it would not otherwise have cognizance.

3. The sum or amount in controversy, exclusive of interest and costs, exceeds $10,000.

4. This action arises and is predicated upon the defendants' violations of the provisions of Sections 13(a) and 14(a) of the 1934 Act and the Commission's rules and regulations promulgated thereunder, and upon the defendants' violations of common law principles.

5. A substantial part of the acts and transactions complained of herein occurred within the territorial limits of the District of Minnesota.

6. Plaintiff is a citizen and resident of the State of New York.

7. Each of the defendants is a citizen and resident of a State other than the State of New York.

8. Plaintiff is the owner of 75 common shares of the defendant, Control Data Corporation (hereinafter referred to as "CDC"), and brings this action derivatively on behalf and in the right of CDC. Plaintiff has owned CDC common stock since 1964, and was a stockholder of CDC at the times of the acts complained of herein.

9. At all times hereinafter mentioned, the defendant, CDC was and still is a corporation organized and existing under the laws of the State of Delaware having its principal place of business in Minneapolis, Minnesota.

10. At the relevant times hereinafter mentioned the following defendants were or still are directors and officers of CDC during the periods stated and hold or have held the positions set forth, as follows:

Norbert R. Berg, Director and Senior Vice President
Thomas G. Kamp, President, Peripheral Products and a Director
William R. Keye, Director and Vice Chairman of the Board
Robert M. Price, President, Computer Group and a Director
Robert D. Schmidt, Executive Vice President and a Director
William C. Norris, Director, Chairman of the Board and Chief Executive Officer
Marvin G. Rogers, Senior Vice President

11. The defendants, present and former officers and employees of CDC and its subsidiaries, were granted stock options which have been or may be exercised by them pursuant to the Plans.

12. At all times hereinafter mentioned to the present time, the common shares of CDC were duly registered with, listed and traded upon the New York Stock Exchange and various other national securities Exchanges, and were not exempted securities.

13. During the period between in or about November, 1967 and May, 1976 the defendants, acting in derogation of their fiduciary duties, did unjustly and illegally obtain and willfully and intentionally permitted the diversion of corporate funds from CDC in order to bribe officials of foreign governments for no proper corporate purpose through devious, improper and illegal methods and did transmit such funds to a certain foreign nation by means which violated both domestic and foreign law; that the defendants did falsify the books and records of CDC and certain subsidiary corporations of CDC for the purpose of

disguising and concealing the true purpose of such payments; that the approximate amount of such monies improperly expended total $380,000.

14. During the period of November, 1967 to May, 1976 the defendants had knowledge that such acts violated the law and that CDC would be exposed to substantial criminal and civil fraud penalties and fines.

15. The defendants held options to purchase substantial amounts of shares of CDC's common stock at exercise prices far below the presently prevailing market price of such shares and that the defendants actually exercised certain options at exercise prices which personally profited the defendants, all done while having the knowledge referred to in numerical paragraphs 13 and 14 above.

16. The defendants caused CDC to plead guilty to certain federal criminal charges arising out of the facts alleged above and that CDC was fined and has paid $1,381,000 in criminal and fraud penalties when in fact the defendants are personally responsible for such fines and penalties.

AS AND FOR A FIRST CLAIM FOR RELIEF

17. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "1" through "16" herein with the same force and effect as though such allegations were fully and at length set forth herein.

18. During the period from 1967 through on or about 1976, by the use of the mails and other instrumentalities of interstate commerce the defendant-directors of CDC, acting in concert with the other directors and officers of CDC, caused CDC to conceal such secret, unauthorized and illegal payments from its shareholders by failing to disclose such information in any Report, Proxy Statement, Registration Statement, Annual Report or other document which CDC was required to file with

the Securities and Exchange Commission under the provisions of Sections 13(a) and 14(a) of the 1934 Act and the Commission's rules and regulations promulgated thereunder.

19. Such illegal payments constituted a waste and spoilation of CDC's assets.

20. As a result of the facts hereinabove alleged, the individual defendants herein have violated the provisions of Sections 13(a) and 14(a) of the 1934 Act and the Commission's rules and regulations promulgated thereunder.

21. During the relevant period, the Board of Directors of CDC passed a Resolution which they caused to be submitted for approval to and which thereafter was approved by the shareholders of CDC at various shareholders meetings adopting an Executive Performance and Retention Plan and a 1970 Qualified-Non-Qualified Stock Option Plan, sometimes referred to herein as the "Plans".

22. Among the major provisions of the Plans were the following:

(a) Officers and key employees of CDC and its subsidiaries are eligible to receive options under the Plan.

(b) The total number of common shares in respect to which options may be granted shall not exceed 1,446,000 shares;

(c) Such Plans shall be administered by the Stock Option and Executive Compensation Committee of the Board of Directors.

(d) The price at which an optionee may exercise his option for the common shares of CDC shall not be less than the market value of such shares on the date the option was granted;

23. In connection with several of CDC's annual shareholders meetings which sought the shareholders' approval of the Plans, those defendants who were then members of the Board of Directors of CDC, acting in concert with the other defendant-

officers and/or employees of CDC and its subsidiaries, by use of the mails and other instrumentalities of interstate commerce, solicited proxies from the shareholders of CDC pursuant to the Proxy Statements mailed to them and filed with the Securities and Exchange Commission. Sucy Proxy Statements were false and misleading because they concealed and failed to disclose material information concerning the willful, improper and illegal misappropriation of corporate funds as herein set forth and the possible civil and criminal penalties applicable thereto.

24. The members of the Board of Directors of CDC did conspire to conceal the illegal and improper conduct as set forth above in an attempt to maintain the market price of CDC shares at an artificially inflated level.

25. The approval by the shareholders of CDC of the Plans was and is null and void and should be set aside.

26. Plaintiff has no adequate remedy at law.

27. Plaintiff has made no demand upon the Board of Directors of CDC to bring this action because such demand would have constituted a useless and futile gesture, and is, therefore, unnecessary for the following reasons:

(a) All of the members of the Board of Directors of CDC have participated in the wrongs herein alleged and have approved and acquiesed thereto and are personally liable for the damages sustained thereby. Any demand upon the Board of Directors would in effect have required its members to sue themselves. Moreover, even were the Board of Directors to file such suit, its prosecuition would be in hostile hands and could not be expected to be prosecuted diligently.

(b) The members of the Board have caused or ratified the acts complained of and have had knowledge of such acts but have taken no action to recover the damages which CDC sustained thereby.

28. Plaintiff has made no demand upon the shareholders of CDC to bring this action because such demand is unnecessary and would be futile for the following reasons:

(a) The acts complained of herein are in violation of the statute, rules and regulations set forth in paragraph numbered "4" herein and constituted a waste of CDC's assets which its shareholders could not legally approve or ratify.

(b) Under the laws of Delaware and the Certificate of Incorporation of CDC, the management of its affairs, including any decisions to bring law suits, is entrusted to the Board of Directors and not to the shareholders.

(c) CDC has many thousands of shareholders who reside throughout the United States and foreign countries, and the expense in contacting them would place an unconscionable financial burden on the plaintiff.

AS AND FOR A SECOND CLAIM FOR RELIEF

29. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "1" through "28" herein with the same force and effect as though such allegations were fully and at length set forth herein.

30. That as a result of the facts hereinabove alleged the defendant directors of CDC have breached their fiduciary duties and have illegally wasted its assets in an amount which can only be ascertained through this action, such amount not less than the $1,381,000 paid by CDC in criminal and civil fraud penalties and fines plus $381,000 in corporate funds spent for improper purposes and attorneys fees and other costs in relation thereto. The Amount of which is presently unknown to plaintiff.

WHEREFORE, Plaintiff demands judgment against the defendants, as follows:

(a) That CDC's Plans, approved by its shareholders at various annual meetings be declared null and void, and that all transactions effected and options granted thereunder to the individual defendants pursuant to such Plan be rescinded.

(b) That the individual defendants account to CDC for all losses and damages sustained by CDC in an amount not less than $1,381,000 and $381,000 in corporate funds improperly spent as well as any attorneys fees or other costs in relation thereto, and for all profits and benefits improperly or illegally realized by them from the acts and transactions alleged in the complaint.

(c) That plaintiff be awarded his costs and disbursements of this action, including reasonable attorneys' and accountants' fees.

(d) That plaintiff have such other, further and different relief as the Court may deem proper.

GENE MESH CO., L.P.A.

/s/ By Gene Mesh
2005 Central Trust Tower
Cincinnati, Ohio 45202
(513) 241-9100

Attorney for Plaintiff

OF COUNSEL:

Chestnut, Brooks and
Burkard, P.A.
900 Midland Bldg.
Minneapolis, Minn.
55401

STATE OF OHIO

SS.

COUNTY OF HAMILTON

ARTHUR ABBEY, being duly sworn, deposes and says:

That deponent is the plaintiff in the within action and has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

/s/
Arthur Abbey

Sworn to before me this 2 day of May 1978.

/s/
Notary Public
GENE I. MESH,
Attorney at Law
Notary Public, State of Ohio
My commission has no
expiration date.
Section 147.03 R.O.

APPENDIX D

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

July 7, 1978

Gene Mesh, Esquire
Gene Mesh Co., L.P.A.
2005 Central Trust Tower
Cincinnati, Ohio 45202

Re: **Abbey v. Control Data Corporation et al.,** 4-78 Civ. 187 (D.Minn.)

Dear Mr. Mesh:

As you are undoubtedly aware, the Board of Directors of Control Data Corporation has created a Special Litigation Committee of independent outside directors, to which the Board has delegated all of its power and authority to consider what course of action should be adopted on behalf of the Corporation with respect to the above-referenced action. None of the members of the Committee is a defendant in the action. This firm has been retained by the Committee as its special counsel.

The Committee has instructed me to write to you, as counsel for the plaintiff, to invite you and/or your client to appear at a meeting of the Committee in the offices of Control Data in Minneapolis at 9 a.m. on July 31, 1978. The Committee invites you and/or your client to present to the Committee at that time any information, views, considerations or factors which you or your client believe should be taken into account by the Committee in performing its responsibilities. Alternatively, if you prefer I am prepared to meet with you and/or your client at a mutually convenient time and location prior to July 31 to receive on behalf of

the Committee any such information, views, considerations or factors. If you prefer this alternative, I will report to the Committee whatever you or your client may communicate to me at its meeting on July 31.

Please advise me of your decision with respect to the Committee's invitation at your earliest convenience.

Sincerely,
/s/ CHARLES LISTER

CL/s

cc: Messrs. Chestnut, Brooks and Burkard, P.A.

July 12, 1978

Charles Lister, Esq.
Covington & Burling
888 Sixteenth St., N.W.
Washington, D. C. 20006

Re: **Abbey v. Control Data Corporation, et al.,**
No. 4-78 Civ. 187 (D. Minn.)

Dear Mr. Lister:

Thank you for your letter of July 7 in regard to the above matter. I find that it would be difficult to be constructive in regard to a meeting of the Special Litigation Committee without having our discovery demands to date fully met by the defendants. As you know, this has not occurred and extensions have been granted by plaintiff at your suggestion which carry us into late August or September. It seems to me you would be asking plaintiff's counsel to make suggestions based upon inadequate facts, whereas the defendants and the Special Litigation Committee has complete control and knowledge of what facts are to

be known. Perhaps you can advise me promptly as to whether or not the writer will have an opportunity to review all data reviewed by the special litigation committee prior to the meeting to be held on July 31. If so, I will be happy to accept your invitation to either attend the meeting or meet with you prior thereto. If not, I suggest postponement of such meeting.

Very truly yours,

GENE MESH CO., L.P.A.
By GENE MESH

GM/ck

cc: Floyd Boline, Esq.